

Message Text

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PAGE 01 GENEVA 02286 160056 Z

64/60

ACTION IO-13

INFO OCT-01 ADP-00 SSO-00 NSCE-00 USIE-00 INRE-00 CIAE-00

DODE-00 PM-09 H-02 INR-10 L-03 NSAE-00 NSC-10 PA-03

RSC-01 PRS-01 SS-15 ACDA-19 GAC-01 OMB-01 AF-10

ARA-11 EA-11 EUR-25 NEA-10 RSR-01 /157 W

----- 072405

O R 151500 Z MAY 73

FM USMISSION GENEVA

TO SECSTATE WASHDC IMMEDIATE 9322

INFO USUN NEW YORK 8815

C O N F I D E N T I A L GENEVA 2286

C O R R E C T E D C O P Y // REFERENCE ADDED

E. O. 11652: GDS

TAGS: PFOR, UN

REF: STATE 91602

SUBJECT: DEFINITION OF AGGRESSION COMMITTEE: INDIRECT USES OF
FORCE

1. DELEGATION VERY MUCH APPRECIATES USEFUL GUIDANCE
CONTAINED REFTEL. WE BELIEVE LANGUAGE CONTAINED PARA. 5
REFTEL HAS CLEAR ADVANTAGE OF GREATER BREVITY THAN
ALTERNATIVE 2 OF WG REPORT. AT SAME TIME DELEGATION
HAS FOLLOWING COMMENTS WHICH DEPARTMENT MAY WISH TO
CONSIDER.

2. RE PARA. 4 REFTEL, WE BELIEVE IT SHOULD BE KEPT IN
MIND THAT ALL OF ACTS PRESENTLY INCLUDED IN LIST INVOLVE
ACTUAL USES, AS OPPOSED TO THREAT OF USE, OF FORCE.
THIS REFLECTS GENERAL AGREEMENT WHICH HAS PREVAILED IN
COMMITTEE THAT WE SHOULD NOT ATTEMPT TO CHARACTERIZE
ACTIVITIES NOT INVOLVING ACTUAL USES OF FORCE AS
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PAGE 02 GENEVA 02286 160056 Z

AGGRESSION SINCE THIS OPENS PANDORA'S BOX WITH RESPECT TO POSSIBLE INCLUSION OF VARIOUS FORMS OF PRESSURE, MILITARY OR OTHERWISE, NOT ACTUALLY INVOLVING USE OF FORCE. THIS GENERAL APPROACH REFLECTED IN AGREED LANGUAGE OF GENERAL DEFINITION WHICH REFERS EXPLICITLY TO "USE OF ARMED FORCE." IT IS THEREFORE DIFFICULT TO ARGUE IN SPECIAL CONTEXT OF INDIRECT USES THAT WE SHOULD INCLUDE ACTIVITIES OF STATES WHICH DO NOT ACTUALLY CULMINATE IN USE OF FORCE. AT SAME TIME IT CAN BE MADE CLEAR THAT IT IS THE ACTIVITIES OF THE STATE INVOLVED-- E. G., ORGANIZING, ENCOURAGING, OR ASSISTING-- WHICH RESULTS IN THE ATTRIBUTION TO THAT STATE OF AN ACT OF AGGRESSION WHEN THE RESULT IS USE OF ARMED FORCE AGAINST ANOTHER STATE.

3. IN ADDITION, IT IS GENERALLY AGREED IN COMMITTEE THAT LIST OF ACTIVITIES CANNOT HOPE TO BE EXHAUSTIVE OF ALL POSSIBLE ACTIVITIES WHICH MAY CONSTITUTE AGGRESSION. AUSTRALIAN DELEGATION HAS DEVELOPED LANGUAGE FOR INTRODUCTION TO LIST OF ACTS WHICH HAS BEEN DISCUSSED IN GROUP OF SIX AND WHICH WE BELIEVE CLEARLY WITHIN OUR PRESENT INSTRUCTIONS, WHICH WOULD MAKE THIS POINT CLEAR. TEXT WOULD BE AS FOLLOWS:
"WITHOUT PREJUDICE TO THE DISCRETION OF THE SECURITY COUNCIL TO DETERMINE OTHER ACTS TO BE ACTS OF AGGRESSION, ANY OF THE FOLLOWING ACTIVITIES, IF IN VIOLATION OF THE CHARTER OF THE UNITED NATIONS, MAY CONSTITUTE AN ACT OF AGGRESSION, REGARDLESS OF A DECLARATION OF WAR..." WE BELIEVE, THEREFORE, THAT POSITIONS OF TYPE TAKEN IN 1964 OAS CONTEXT (PARA 3 REFTEL) WOULD CLEARLY NOT BE FORECLOSED IF WE LIMITED REFERENCE IN LIST TO ACTS OF INDIRECT FORCE WHICH ACTUALLY RESULTED IN USE OF FORCE AGAINST VICTIM STATE.

4. IF THE FOREGOING REASONING ACCEPTED, IT SEEMS TO US THAT DEPARTMENT'S OBJECTION TO "NATURE AND MAGNITUDE" LANGUAGE, AS SET FORTH PARA 4 REFTEL, IS MORE APPARENT THAN REAL.

5. AS TO DEPARTMENT'S LANGUAGE PARA 5 REFTEL, WE HAVE FOLLOWING SPECIFIC THOUGHTS: (A) IN ACCORDANCE WITH FOREGOING PROPOSALS, DELEGATION WOULD SUGGEST DELETION OF REFERENCE TO "THREAT" OF FORCE SO THAT REFERENCE
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PAGE 03 GENEVA 02286 160056 Z

WOULD BE TO "ACTS... IN ANOTHER STATE INVOLVING A USE OF FORCE." WE NOTE THAT USE OF FORCE IN THIS CONTEXT CAN INCLUDE DEMONSTRATION OF FORCE, IN THE SAME WAY THAT AN INVASION WOULD INVOLVE USE OF FORCE EVEN WITHOUT A SHOT BEING FIRED. (B) AUSTRALIANS HAVE ARGUED THAT PHRASE "CIVIL STRIFE" IS EXTREMELY UNCLEAR AND HAVE TAKEN STRONG POSITION THAT WE SHOULD ELIMINATE AT LEAST THIS CONCEPT

FROM OUR LANGUAGE ON INDIRECT USES OF FORCE. (C) AS DEPARTMENT AWARE, EXPLICIT REFERENCE TO " TERRORIST ACTIVITIES" IS PARTICULAR RED FLAG FOR MANY MEMBERS OF NON- ALIGNED GROUP, IT IS NOT CLEAR TO US WHY THIS CONCEPT, ALONG WITH " CIVIL STRIFE", CANNOT BE COVERED BY GENERAL PHRASE " THE CARRYING OUR OF ACTIVITIES IN ANOTHER STATE INVOLVING A USE OF FORCE." IN FACT, WE THOUGHT FORMULATION CONTAINED GENEVA 2165 HAD ADVANTAGE OF BEING BROADER IN THAT IT DID NOT REQUIRE ACT TO BE CARRIED OUT IN TERRITORY OF THE OTHER STATE BUT CONCERNED ON ITS EFFECTS ON THE OTHER STATE. THIS WOULD BE MORE DESIRABLE FROM US POINT OF VIEW BECAUSE IT WOULD INCLUDE ACTIVITIES AGAINST US AIRCRAFT, VESSELS, AND NATIONALS. FOR THIS REASON IN PARTICULAR, WE STILL INCLINED TO BELIEVE LANGUAGE CONTAINED GENEVA 2165 HAS SIGNIFICANT ADVANTAGES IF WE CAN FIND APPROPRIATE FORMULATION WITH RESPECT TO TYPE AND MAGNITUDE OF EFFECT WHICH MUST BE SHOWN.

6. DEPARTMENT MAY WISH TO CONSIDER FOLLOWING POSSIBLE CHANGES IN LANGUAGE PARA 5 REFTEL.

(A) DELETION OF PHRASE " OF CIVIL STRIFE OF TERRORIST ACTIVITIES" AND OF PHRASE " THREAT OR," BOTH FOR REASONS SET FORTH ABOVE.

(B) INSTEAD OF PHRASE " IN ANOTHER STATE" SUBSTITUTE " AGAINST ANOTHER STATE," THUS BROADENING PROVISION SO IT WOULD APPLY TO ACTS HAVING EFFECTS OUTSIDE TERRITORY OF AFFECTED STATE.

(C) REPLACING WORDS " DIRECTED TOWARDS" WITH WORDS " RESULTING IN." THIS WOULD AVOID CRITICISM THAT LANGUAGE WOULD INCLUDE ACTS NOT INVOLVING ACTUAL USES

CONFIDENTIAL

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PAGE 04 GENEVA 02286 160056 Z

OF FORCE BUT WOULD NOT PRECLUDE ARGUMENT IN A PARTICULAR CASE IN FUTURE THAT (I) THE ACTS CONSTITUTED AGGRESSION EVEN IN ABSENCE OF EFFECTS, (II) THAT SUCH ACTIVITIES CONSTITUTES BREACH OF PEACE OR THREAT TO PEACE, AND (III) THAT RIGHT OF SELF- DEFENSE EXISTS EVEN IN ABSENCE OF EFFECT (LEGAL USES OF FORCE WILL BE PROTECTED IN SEVERAL PLACES IN DEFINITION, PARTICULARLY TO MAKE CLEAR THAT LIST OF ACTS IS WITHOUT PREJUDICE TO SCOPE OF CHARTER PROVISIONS ON LAWFUL USES OF FORCE, I. E., EXCLUSION OF AN ACT FROM LIST DOES NOT IMPLY ABSENCE OF RIGHT OF SELF- DEFENSE AGAINST THAT ACT).

7. WE EXPECT BEGIN INTENSIVE DISCUSSIONS ON PROBLEM OF INDIRECT FORCE THIS AFTERNOON.

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*** Current Handling Restrictions *** n/a

*** Current Classification *** CONFIDENTIAL

Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts:
Control Number: n/a
Copy: SINGLE
Draft Date: 15 MAY 1973
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: kelleyw0
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1973GENEVA02286
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: RR
Errors: n/a
Film Number: n/a
From: GENEVA
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1973/newtext/t19730545/aaaajfog.tel
Line Count: 172
Locator: TEXT ON-LINE
Office: ACTION IO
Original Classification: CONFIDENTIAL
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 4
Previous Channel Indicators:
Previous Classification: CONFIDENTIAL
Previous Handling Restrictions: n/a
Reference: 73 STATE 91602
Review Action: RELEASED, APPROVED
Review Authority: kelleyw0
Review Comment: n/a
Review Content Flags:
Review Date: 28 SEP 2001
Review Event:
Review Exemptions: n/a
Review History: RELEASED <28-Sep-2001 by rowellE0>; APPROVED <23-Oct-2001 by kelleyw0>
Review Markings:

Declassified/Released
US Department of State
EO Systematic Review
30 JUN 2005

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: <DBA CORRECTED> gwr 980213
Subject: DEFINITION OF AGGRESSION COMMITTEE
TAGS: PFOR, UN
To: IO
SECSTATE WASHDC
USUN NEW YORK
Type: TE
Markings: Declassified/Released US Department of State EO Systematic Review 30 JUN 2005